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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 526

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE, *Petitioner*

v.

HARPER & BROTHERS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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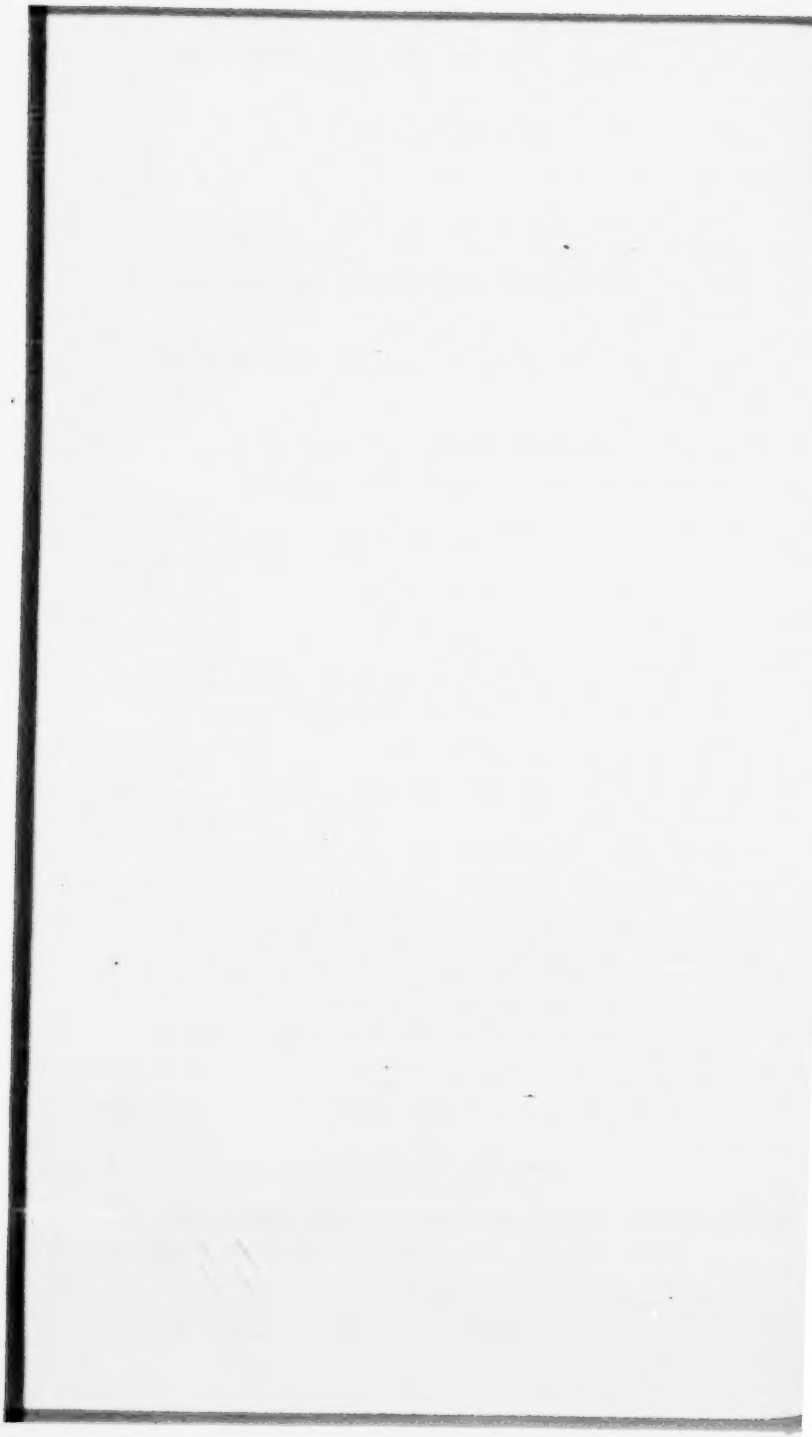

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, affirming a jury verdict for respondent in a damage action based on the Robinson-Patman Act.

The writ should issue for two basic reasons. First, the questions presented are of fundamental importance to the construction and administration of the

cost proviso of the Robinson-Patman Act. The Court has recognized the special significance of this feature of the statute (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43-45 (1948)), but has never had occasion to review it. Next, the effectiveness of the basic prohibition against preferential pricing is nullified by the interpretation and application of the cost proviso adopted by both lower courts in this case. As a practical matter their treatment of the statute forecloses private remedies for price discrimination.

OPINION BELOW

The opinion below appears at App. 1a to 6a[1], and is reported at 235 F. 2d 420-423 (2d Cir. 1956). The trial court's instructions to the jury, from which the appeal was taken, appears at PR. 1-44.

JURISDICTION

The judgment of the Court of Appeals, reproduced at App. 7a, was entered July 30, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a)(1). The jurisdiction of the District Court was based upon Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15.

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[1] The following designations to the record are used herein:

"App."—Opinion and judgment below, comprising pages 1a to 7a of the appendix to this Petition.

"PR."—Printed record below (numbered 1-59, inclusive, followed by 1(a) to 59(a), inclusive).

"Tr."—Transcript of the trial, comprising pages 1 to 1298.

"R."—Other parts of the trial court record, comprising pages 1301-1601.

"PX"—Petitioner's exhibits not printed below.

"RX"—Respondent's exhibits not printed below.

STATUTE INVOLVED

The statute involved is Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), and particularly the cost proviso of that provision. So far as pertinent the statute provides that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are ... sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

QUESTIONS PRESENTED

1. Whether the cost proviso of the Robinson-Patman Act permits discriminatory prices to be justified by evidence consisting of unevaluated claims of intangible cost savings, unsupported by any cost data and characterized by the court below itself as "conjectural accounting estimates"?

2. Whether the statute sanctions the justification of discriminatory prices by a cost study which, in the lower court's words, was made in the absence of any "relevant cost records" for the period in question and was based instead on material reflecting composite cost data not even limited to the seller's industry?

3. Whether the statute accords any legal materiality to a cost study which confessedly, and on its face, justifies less than half of the conceded price discrimination?

4. May cost savings computed on a cumulative annual basis be used to defend a pricing system which favors preferred customers against others in identical transactions?

5. Whether the statute authorizes a seller to tailor a cost study by ignoring factors in which there is comparatively greater expense in selling the favored buyers?

6. Whether, contrary to a clearcut declaration of legislative purpose, price discrimination may be cost-justified by distinctively ascribing to the favored customers the benefits of the entire saving resulting from the addition of their orders to the sellers' other business?

7. Whether the buyer's motive in suing is material to a seller's statutory liability for price discrimination?

STATEMENT

(a) The Facts

(1) Petitioner is a Toledo, Ohio book jobber, doing business as College Book Exchange (PR. 48) and respondent, Harper & Brothers, is one of the largest book publishers in the United States (Tr. 9). Peti-

tioner sued for damages on account of respondent's price discrimination, contrary to the Robinson-Patman Act, in charging him more for identical books than it charged his competitors, during the period November 1, 1941 to March 7, 1950 (R. 1301-1308).[2] Petitioner sought an award reflecting the excess prices, approximating $4,100, he paid on actual purchases of respondent's books, plus profits on additional business he was unable to do because of the discrimination, estimated within a range of $38,000 to $49,000 (PR. 32-33).

(2) Respondent's prices, expressed in terms of discounts from its list prices to the public (Tr. 13), were admittedly higher in sales to petitioner than to other jobbers (PR. 6). The discrimination reflected respondent's use of a "confidential" price list, kept secret from its customers, including petitioner (Tr. 12-13, 140-141; PX W-7). This contained three separate discount schedules for orders of similar quantities of books: one for retail booksellers; an intermediate, somewhat more favorable, schedule for certain listed jobbers; and a third, substantially better, schedule, for a few named jobbers, including American News Company and Baker & Taylor of New York City and A. C. McClurg & Co. of Chicago (PX W-7). Petitioner was sold at the schedule for retail booksellers until November 1949, when respondent finally admitted that he was entitled to "Jobber status" and offered him the intermediate schedule (PR. 48).

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[2] Subsequent references to "the period" means November 1, 1941, to March 7, 1950. The length of the period is due to the Acts of Congress tolling the running of time limitations under the antitrust laws from October 10, 1942 to June 30, 1946. Act of Oct. 10, 1942, Ch. 589, 56 Stat. 781, as amended June 30, 1945, Ch. 213, 59 Stat. 306. Respondent's defense of time limitation was overruled by the Court at the outset of the case (Tr. 46-49).

(3) According to its own evidence, respondent's average discounts to petitioner during the period were 39.9 per cent, compared with 44.9 per cent to American News Company, 44.8 per cent to Baker & Taylor and 44.1 per cent to McClurg (Tr. 1087-1089).

(4) Petitioner sold books in every state of the Union (Tr. 121, 432, 436; PR. 50-55) and competed for the patronage of customers who dealt with respondent's preferred jobbers (PR. 50-55, 51(a); Tr. 69-70; 817-818).

(5) On resales to their own customers, the average discounts allowed by petitioner from respondent's list prices, were three per cent less favorable than those granted by American News Company, as follows (Tr. 35-37; PR. 56):

Type of Customer	American News Company	Petitioner
Libraries	34%	31%
Retail Bookstores	37%	34%

That price controlled the jobbers' competitive ability was testified not only by petitioner (Tr. 209-210, 227), but also by the purchasing agent of the Washington, D. C., Public Library (Tr. 102) and by officials of the favored jobbers called as witnesses by respondent (Tr. 821, 868-869, 1065, 1073).

(6) Respondent charged transportation costs to petitioner, but furnished free delivery to customers in New York City (Tr. 1127), the home of American News Company and Baker & Taylor, its largest jobber customers (Tr. 1019, 1046; 1065; PX 10, 10A).[3]

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[3] American News Company also had branch offices in more than thirty leading cities (Tr. 6-7) but received the great bulk of respondent's shipments in New York City. Not more than 20 per

Respondent also allowed more favorable terms of payment to its favored jobbers, secretly allowing them 120 days to pay its invoices, compared with petitioner's 60, and better cash discount conditions (Tr. 606, 979-980, 993-994, 998-999).

(7) Respondent's sole attempted affirmative defense was that its price discrimination against petitioner was justified by cost savings (Tr. 1223-1224; PR. 6, 18, 23). Its sole accounting evidence was a cost study prepared by an accountant named Gayle in 1955, on the eve, and for the purpose, of the trial of this case (Tr. 1083, 1112-1113). It was deliberately "restrict[ed]" to a comparison of *selected* elements of respondent's expenses, called "billing, bookkeeping and shipping costs", in transactions with petitioner and with its three largest favored jobbers, including American News Company (Tr. 1082). This was done on a cumulative annual basis. The method was to divide total annual sales to each of the four customers, as shown by respondent's invoices, into the aggregate annual cost of billing, bookkeeping and shipping the invoiced books (Tr. 1129, 1139-1140).

(8) Taken at its own face value, this study (hereafter the Gayle Study) *fell short by 56 per cent* of justifying the price discrimination which respondent conceded that it practiced against petitioner and in favor of American News. Specifically, $3,211 of price discrimination was admitted on petitioner's actual purchases and only $1,430 was claimed to be justified

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cent of respondent's books, representing new titles, were shipped directly to such branches (Tr. 5, 28-30, 62). Preferential prices were also accorded this customer on separately invoiced "drop" shipments to its branches, no greater in size than those made to petitioner (PR. 23).

by cost savings, leaving an unaccounted for balance of $1,781 (PR. 17-18, 20, 24; App. 2a-3a).

(9) In connection with the cost savings defense, respondent's only other reliance was upon asserted "intangible" savings which it had "not even attempted" to value (PR. 21). According to the trial court, they were said to result from the prompter payment of bills by the favored jobbers, compared with petitioner, and from the avoidance of "overproduction" losses due to the predictability of substantial orders from the favored purchasers (*Ibid*).[4]

(10) Petitioner moved to strike respondent's "evidence as to cost justification on the ground that on its face that evidence does not constitute a cost saving defense within the meaning of the statute", but the motion was denied (Tr. 1224-1224A). The Court also ignored petitioner's requests that the jury be instructed that it must find against respondent on the cost justification issue (R. 1551, 1555; PR. 20).

(11) The Gayle Study was made without reference to any "relevant cost records for the period of 1941 to 1950" (App. 4a; Tr. 1113-1114, 1119-1120). It was based, rather, upon an examination of respondent's 1951 billing, bookkeeping and shipping expenses (Tr. 1091-1092; App. 3a). These expenses were then adjusted back to the period in question by the use of an index of average general clerical salary rates, *not lim-*

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[4] The underlying evidence consisted of an analysis of Reid's account showing that his payments were sometimes late (Tr. 983-989). But the witness in question, respondent's credit manager, admittedly did not know whether there would have been any delinquencies if petitioner had been granted the 120 day terms extended to the favored jobbers (Tr. 999).

Nowhere in the evidence do we find any reference to "overproduction" losses.

ited to the book publishing industry, issued by the Commerce and Industry Association of New York, it being "assumed" that all other costs changed about the same amount (Tr. 1105-1106, 1121-1122). Gayle himself testified: *"A cost study is no good if it does not work on the exact conditions of the industry that it refers to"* (Tr. 1140-1141; emphasis supplied).

(12) The Gayle Study took no account of the fact that respondent charged transportation costs on all deliveries to petitioner, but furnished free delivery to its customers in New York City, including the largest preferred jobbers, American News and Baker & Taylor (Tr. 968-969, 1046, 1127). Nor did the Report consider comparative selling costs (Tr. 1122-1123). There were no such costs in dealing with petitioner according to the testimony of respondent's president that " 'We offered no books to plaintiff; . . .' ", but sold him pursuant to his orders (Tr. 556-557).

(13) As to respondent's lack of any cost records for the period in question, the trial court charged that Gayle's method of adjusting back its subsequent costs was *"a perfectly valid basis for doing it"*, although the jury could accept or reject his "assumptions" or "conclusions" (PR. 19-20; emphasis supplied). He further charged that if the jury accepted Gayle's computations and assumptions, it *"must"* deduct the partial cost differences he showed *"pro tanto"* from the price discrimination against petitioner (PR. 19-20, 24). It was left to the jury to decide whether the averaging of costs on a cumulative annual basis justified respondent's practice of aggregating orders from American News and thereby charging it lower prices on separately invoiced shipments to its branches than it charged petitioner on shipments

of equivalent quantities (PR. 19-20). The Court ignored petitioner's requests for instructions that Gayle took no account of selling and transportation costs and that respondent's discount schedules favored the preferred customers, regardless of the size of their orders compared with petitioner's (R. 1558, 1562). The charge made no comment whatever on these points.

(14) Regarding the purported intangible cost savings, the Court charged (PR. 21):

> *"The defendant has also referred to certain intangible cost savings. They have not attempted to give any value to those costs savings but you can consider them* because to some extent they were costs to the seller, Harper & Brothers, and one thing they say is that the defendant's experience in connection with the collection of the bills of these wholesalers, or with respect to the full jobbers was that they, Harper & Brothers, always got paid promptly, and with respect to Reid they had a lot of trouble.
>
> They also say that due to the fact that over a long period of time they were substantial purchases which were predictable, the very fact of their predictability permitted them to avoid overproduction and thereby avoid losses.
>
> It is very difficult in a trial to attach a dollar value to these intangible elements and the defendant *has not even attempted to do so,* but they have mentioned them and I mention them to you for what they are worth. *You can take them into consideration in addition to the cost savings which have been calculated by Gayle in connection with that report"* (emphasis supplied).

(15) The jury was instructed that before considering any other questions, it should decide whether petitioner was competitively injured by respondent's dis-

crimination (PR. 8-9, 14-15, 16). But in the course of its deliberations it requested that the cost proviso be reread to it (PR. 40-41).

(16) Petitioner was on the stand five days (App. 5a-6a). During a lengthy cross examination an inconsistency was developed between his testimony about the effect of a 1947 fire on his working capital and a letter he had written to his creditors more than six years earlier (Tr. 342, 451, App. 5a-6a). On the sole basis of that letter, the trial court gave the following instructions to the jury, confessedly magnifying the incident beyond the limits deemed proper by respondent's own counsel (PR. 27-28):

> "Now, let me allude for a minute to an important piece of evidence that has been argued about and it is in this case because it affects the credibility of Reid to a very important extent and must be considered by you in connection with the weight that you attach to his testimony *and to the claim which he makes in this case.* And that is the letter in which he talks about the fire. I think it is Defendant's Exhibit P.
>
> "There is no doubt that Reid wrote that letter and Reid does not deny that he said what he said when he said it. It is up to you to decide what that letter means because, *although the attorney for Harper & Brothers was very polite and did not quite say so,* the brutal fact remains that what he is charging Reid with is making a fantastic and baseless claim here in an effort to recover money that he lost as the result of misusing his insurance collection.
>
> Now, you have to decide whether or not Reid lost his insurance money improvidently and then got stimulated by that loss to find a way in which to make up for it by making a baseless claim. You

see, it goes into his basic claim; *it goes into his claim for damages, and it goes into his credibility as a witness,* and you have to give that exhibit very careful consideration.

You have heard Reid's attorney talk about it and, as I recall it, he stated that these price differentials went on before; that this fire did not affect the situation at all; that his business was getting better, and that whatever he said there in that letter did not make any difference.

But that letter is before you, ladies and gentlemen, and you must give it very careful consideration, because if it is susceptible of the interpretation that Reid thought up this Robinson-Patman Act violation case as a means of collecting money from Harper & Brothers which he never believed and does not believe now that he is entitled to, *you can see how it destroys the very basis for his claim and certainly would destroy much of his testimony with respect to his claim for damages"* (emphasis supplied).[5]

(17) Petitioner had accidentally learned of the discrimination against him in 1941, when respondent mistakenly sent him an invoice intended for another jobber and allowing a 5 per cent lower price than petitioner was paying (Tr. 153-157). Subsequently petitioner made frequent oral and written complaints about respondent's discrimination (Tr. 159-168, 969-970). He got no results until November 7, 1949, when respondent wrote petitioner that he was being accorded "Jobber status" in a letter also expressing appreciation of the "nice job" he was doing with its books and of "what it has meant to work out the collection angle

[5] During its deliberations the jury had this instruction reread to it (PR. 41-42).

on your account so smoothly" (PR. 48). Soon after, on March 7, 1950 respondent returned an order from petitioner advising, without explanation, "that we are compelled to discontinue our business relationship" (PR. 57). The complaint in this case was filed May 31, 1950.

(b) The Opinion Below

Characterizing the evidence in question as "conjectural accounting estimates", the Court below nevertheless sustained the charge on intangible costs because the instruction included the remark that they were mentioned "for what they are worth" (App. 3a-4a).

Conceding the absence of "relevant cost records", the opinion sustained the validity of respondent's accounting study on the grounds that it was "the best available procedure" and that "the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data from litigation-inspired accounting methods" (App. 4a).

The charge as to Gayle's averaging of costs on a cumulative annual basis was upheld on the reasoning that to require justification on each transaction "would prove unduly onerous [and] . . . discourage *all* price differentials" and that the Federal Trade Commission had sustained this method "absent a showing that the lack of uniformity in the price spread had any competitive significance" (App. 5a).

The charge that a partial cost justification "must" be accepted *pro tanto* was held immaterial on the ground that the jury "never reached the question of the measure of damages" (App. 5a).

The "motive" charge was upheld as within a trial court's prerogative to comment on evidence and on the theory that the jury had been "properly informed" that petitioner's motive was immaterial to his statutory rights and bore only on his credibility (App. 5a-6a).

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions concerning the application of the cost proviso added to Section 2 of the Clayton Act by the Robinson-Patman Act. The meaning of the proviso has never been reviewed here, despite the Court's recognition of its overriding importance to the intended legislative regulation of price discrimination. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43-45 (1948). As there emphasized, the proviso's purpose was to overcome the self-defeating weakness of the previous legislation, sanctioning mere quantity differences as a basis for preferential pricing, by requiring the seller to show affirmatively that cost savings support his price differentials. In the words of Congress the proviso requires the seller to prove that the differentials were within "the sphere of actual cost differences" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9), "demonstrable as between the particular customers concerned in the discrimination" (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5).

As hereinafter shown, the construction of the proviso adopted below endorses indefensibly loose standards for sustaining a claim of cost savings.[6] Their

[6] This very respondent elected not to defend a Federal Trade Commission complaint against the same price practices challenged here and instead, after the verdict below, entered into a consent order to discontinue them. 3 CCH Tr. Reg. Rep. Par. 25,936 (F.T.C. Docket No. 5898).

practical effect is to invert the prescribed burden of proof by saddling the buyer with the insuperable burden of *disproving* cost justification. Compare *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 68-70 (1953). The realistic result is to foreclose private remedies for price discrimination. The gravity of this development is emphasized by the conviction of informed lawyers that violations of the antitrust laws are deterred by " 'the threat of treble damage suits, even more than the possibility of Government action' " (Comment, 61 YALE L.J. 1010, 1061 at note 334).

1. The erroneous acceptance of evidence comprised of "conjectural estimates" of "intangible" cost-savings

The trial court advised the jury that it could consider "certain intangible cost savings", although respondent had "not even attempted to give any value to those savings" (PR. 21).

In sustaining this charge the court below adopted the unprecedented view that the Robinson-Patman Act sanctions a cost savings defense based on *"conjectural accounting estimates alone"* (App. 3a; emphasis supplied).

As a matter of law, such evidence is clearly worthless and should not have been submitted to the jury at all, much less brought to its attention.[7] The holding

[7] Actually, read in full context, the trial court's remark that the "intangibles" were submitted for "what they are worth" had no disparaging effect. Immediately afterward, he charged: "You can take them into consideration in addition to the cost savings which have been calculated by Gayle in connection with that report" (PR. 21). And the inference is plain that the jury relied on the "intangibles" in arriving at its verdict. See note 12 *infra.*

below represents the first, and to date the only, repudiation of the need for sound accounting data to prove a cost justification defense. No judicial authority supports it. Neither does the legislative history. Mere "conjectural accounting estimates" do not meet the predetermined Congressional standard that the asserted differences in cost as between customers must be "demonstrable", and "actual" (S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 5-6; H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9). As this Court knows, the Federal Trade Commission has consistently required meticulous cost accounting data as a basis for a cost-savings defense (*Automatic Canteen Company* v. *Federal Trade Commission*, 346 U.S. 61, 68-70 (1953)). The commentators uniformly recognize the indispensability of sound accounting data to establish a cost justification of a price differential. As Cyrus Austin says in his Monograph for the American Law Institute, entitled PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (Rev. ed., Nov. 1953), at pp. 59-60:

> "The establishment of an accurate system of distribution cost accounting based upon current factual and objective cost studies is of prime importance in establishing cost justification based upon differences in selling and delivery costs.
>
> * * *
>
> "Cost analyses based upon unsupported estimates are not acceptable as proof of justification of price differentials".[8]

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[8] See also: Zlinkoff and Barnard, *Basing Points and Quantity Discounts*, 48 COL. L. REV. 953, 1029 (1948); Shniderman, *FTC Orders Under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct*, 65 HARV. L. REV. 750, 751 (1952); Bayly, *Four Years Under the Robinson-*

If the contrary view of the court below is correct, then twenty years of experience in construing and applying the statute are wrong.

Acceptance of the lower courts' novel theory would, in effect, invert the statute by saddling the buyer with the impossible burden of *disproving* the existence of any cost justification for a seller's discrimination. Upon a challenge to his prices, the seller need only produce generalized testimony estimating that the differentials were justified by cost savings realized in transactions with favored customers. This could not be rebutted by a buyer. As this Court perceived in the *Automatic Canteen* case, *supra,* 346 U.S. 61, 68-69, 78 (1953), a seller's costs are not even ascertainable from records which a buyer could subpoena and could not be established without the seller's "cooperation". Such "cooperation" is impossible by definition when the buyer is engaged in an adversary proceeding against his seller.

In short, as a practical matter, the holding below curtails the possibility of private enforcement of the Act's proscriptions against price discrimination. Nor can this consequence be minimized on the premise that the Federal Trade Commission may take a different approach. The Commission cannot cover all fronts and its enforcement weapons are not backed by the prophylactic impact of liability in money damages. See Comment, 61 YALE L. J. 1010, 1061 at note 334.

Patman Act, 25 MINN. L. REV. 131, 166-167 (1941); Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials Under the Robinson-Patman Act,* 30 TEX. L. REV. 1, 18-19 (1951); Note, 36 COL. L. REV. 1285, 1307 (1936); Note, 50 HARV. L. REV. 106, 111 (1936); Note, 65 HARV. L. REV. 1011 (1952); Comment, 35 ILL. L. REV. 60, 61 (1940).

2. The opinion below erroneously permits discriminatory prices to be cost justified without regard to the seller's cost records or his actual cost savings

The lower court sustained the validity of a cost study admittedly lacking any foundation in the seller's "relevant cost records for the period of 1941 to 1950", and reflecting, instead, overall statistics published by the Commerce and Industry Association of New York. This conclusion was justified on the asserted ground that "the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data delivered from litigation-inspired accounting methods" (App. 4a).

The ruling below is opposed to the statutory concept of individual responsibility; is in square conflict with the expressed legislative intent; and provides an easy shield for the justification of illegal prices.

Not only is the statutory text cast in terms of the prices and costs of the individual seller, but Congress made this plain at the very beginning. It emphasized that the statute concerned "relations between a *given* seller and his several customers" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8; emphasis supplied). It warned that cost savings were to be recognized only as "between the particular customers concerned" and only insofar as predicated on *"actual"* cost differences (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5; emphasis supplied). It said the cost proviso prescribed the following test (*Id.* at 6):

> "It is designed, in short, to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much

more per unit would it *actually* cost the seller to do so, his other business remaining the same?" (Emphasis supplied).

There was thus an unequivocal congressional mandate that sellers intending to defend discriminatory prices on cost savings grounds must preserve records disclosing their own cost variances as between their own customers. Otherwise "*actual*" cost differences could not be determined, nor could the specified test be applied.

By permitting recourse to the Commerce and Industry Association figures used in this case, the lower court endorsed a cost justification which did not reflect the seller's "actual" cost differences, but at best showed what they *might* have been. A highly speculative presumption was thereby substituted for the statutory requirement of actual fact. Only by the sheerest coincidence could those composite statistics have reflected respondent's actual experience.

Indeed, the testimony of Gayle himself belies the factual validity of any such basis of cost justification. He admitted that the figures he used were not limited to the publishing industry (Tr. 1121-1122) and further testified: "A cost study is no good if it does not work on the exact conditions of the industry that it refers to" (Tr. 1140-1141).

The mischief of the lower court's ruling far transcends the resulting injustice to this individual petitioner. Once actual individual experience is abandoned as the criterion of cost justification, the seller who discriminates in price is immediately buttressed by the familiar flexibility of statistical analysis. The opinion below thus invites the non-complying seller to dispose of his own records in the comforting realiza-

tion that, if necessary, data supporting his pricing practices can likely be procured from other sources.

Furthermore, contrary to the legislative purpose, the practical result is again to impose upon the victim of discrimination the insuperable burden of disproving the asserted justification. (See p. 17, *supra*). Congress placed the obligation of establishing a cost defense on the seller (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). It was not the lower court's prerogative to dilute that obligation because of concern for the "dilemma confronting defendants in suits such as these" (App. 4a). As this Court said in a comparable situation, involving a taxpayer's difficulties in meeting a requirement of proof prescribed by the Internal Revenue Code: "The impossibility of proving a material fact upon which the right to relief depends simply leaves the claimant upon whom the burden rests with an unenforceable claim" (*Burnet* v. *Houston*, 283 U.S. 223, 228 (1931)). See also *Boehm* v. *Commissioner of Internal Revenue*, 326 U.S. 287, 295 (1945).[9]

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[9] Neither authority cited below supports the view that a cost justification can be proved by extraneous data when the seller lacks "relevant cost records" (App. 4a). In *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951) there was an intensive study of the seller's own cost history over "a test period of more than four years" (191 F. 2d at 51, 59). There was no suggestion in *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948) that any cost experience other than the seller's was reflected in an "extensive cost study made . . . with considerable care and great practicularity of detail" (*Id.* at 394).

It may be appropriate in a Commission proceeding to consider a seller's current cost data, in testing preexisting price differentials. For the administrative proceeding is in the nature of an equity suit looking to an order governing *future pricing practices*. But such data has no place in a damage suit concerned solely with the past legality of the vendor's discrimination.

3. The rulings below permit a seller to tailor a cost-savings defense by ignoring factors on which higher costs are incurred in transactions with the favored customers

In concluding that respondent's cost study had "a valid basis", neither lower court discussed the issues raised by the exclusion of expense factors on which there were cost savings in the transactions with petitioner. Gayle's testimony showed that his study was deliberately "restrict[ed]" to selected cost elements (Tr. 1082). He admittedly ignored respondent's practice of charging transportation costs to petitioner, while absorbing that expense on deliveries in New York City (Tr. 1127), where its largest jobber, American News Company, had its main office and received the bulk of its books, and its second largest jobber, Baker & Taylor, had its sole location (PX 10 and 10A; Tr. 5, 28-30, 62, 1019, 1046. Nor did the study compare selling costs as between the customers involved (Tr. 1122-1123a), although respondent incurred no such expense in petitioner's case (Tr. 556-557). The legislative history is clear that the cost-savings proviso is particularly concerned with "selling and transportation costs" (S. Rep. 1502, 74th Cong., 2d Sess., p. 5).

By ignoring these self-serving deficiencies in the accounting procedure used here, the lower courts tacitly endorsed the indefensible concept that a vendor may cost-justify his price differentials by a tailored study, reflecting only particular expense items which support the discrimination and disregarding others which do not. The whole truth, not the half-truth, is the contemplated and indispensable standard of cost-justification under the statute. This simple requirement of fair dealing needs declaration now, before other vendors are tempted to follow respondent's example. Certainly private litigants cannot undertake the burden

of proving that other undisclosed variances negate a seller's claimed cost savings.

4. Endorsement of the cumulative costing method authorized below thwarts the Act by insuring an automatic cost defense for the most indefensible form of price discrimination

Respondent's discount schedules were framed on a size-of-order basis. Since he was sold at the retail bookseller schedule, petitioner would have paid higher prices if every one of his orders had coincided precisely in size with those of the favored customers (PX W-7; PR. 48, 22a).

As conceded in the opinion below, respondent nevertheless "calculated comparative costs for plaintiff and defendant's three largest jobbers, by averaging total shipments on a cumulative basis for an entire year" (App. 4a). This process was upheld on the theory that rejection of the "aggregate" method employed might "discourage *all* price differentials, even those actually justified by cost distinctions" (App. 5a).

The vice of the holding below is manifest. Favoritism of preferred customers on equivalent purchases necessarily enables them to get the lion's share of the resale business and thus to buy in larger quantities. Such larger purchases, made possible by the discrimination, can then be used as a basis for cost justifying the preferential pricing. This confronts the victims with a vicious circle from which no escape is possible.[10]

There can be no cost justification for a pricing system which favors some customers against others on

[10] Cumulative costing is permissible, if ever, only where the discounts are based on cumulative annual purchases. Compare the discount schedules in *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 41 (1948) and *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F. 2d 919, 921, note 2 (5th Cir. 1951).

identical transactions. The procedure endorsed below completely thwarts the statute by providing an automatic cost defense for the most blatant form of price discrimination.[11]

5. The case raises the important question whether the Act imparts any force to an incomplete cost justification, an issue on which the Circuit Courts have divided and on which this Court's decisions indicate that the wrong result was reached here

Taken at face value, respondent's cost study confessedly justified less than half of the admitted discrimination against petitioner (App. 2a-3a). The trial court denied petitioner's motion to strike it, made on the ground that "on its face that evidence does not constitute a cost savings defense within the meaning of the statute" (Tr. 1224-1224A). The jury was instructed that any partial cost saving "must" be deducted "*pro tanto*" from any award of damages for the discrimination (PR. 20, 24). The court below declined to pass on this charge, stating that the verdict for respondent indicated that the jury never reached the damage issue (App. 5a). It wholly overlooked the fact that, apart from the instruction, the motion to strike put squarely in issue the question whether an

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[11] *Sylvania Electric Products, Inc.*, F.T.C. Docket No. 5728, affords no support for the result below. Both the majority and concurring opinions emphasized that the price differentials there in question had no competitive significance and limited the decision to its peculiar facts. See Commission's slipsheet opinion at 2-3; concurring slipsheet opinion at 3-4. Further, where there is no competitive effect, price discrimination is permissible whether or not it is cost justified. Significantly, the opinion below does not state that respondent's price differences had no competitive effect. The contrary was shown both by the evidence and the course of the jury's deliberations. See par. 4, p. 6, and note 12, p. 24, *infra*.

incomplete cost justification is material evidence. Furthermore the record plainly suggests that the verdict, refusing any damages, was necessarily affected by the charge in question.[12]

In two Circuit Court cases, involving appeals from judgments against the same seller in private price discrimination actions, the question arose whether a certain price differential—a so-called "runway allowance"—had to be cost justified in full. This was held necessary in *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F. 2d 919, 924 (5th Cir. 1951), supplemented 190 F. 2d 73 (5th Cir. 1951), certiorari dismissed, 342 U.S. 875. But the *pro tanto* deduction theory of the trial court here was held proper in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 56 (8th Cir. 1951), where the court expressly recognized that "[o]ur views differ in some respects" from those of the Fifth Circuit Court of Appeals in the *Bruce's Juices* case, *supra* (191 F. 2d at 60).

Furthermore the proposition that a partial cost justification is material evidence opposes two decisions of this Court. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44 (1948), this Court declared that the effect of the proviso in Section 2(a) is "to protect competition from *all* price differentials except those based *in full* on cost savings (emphasis

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[12] That the jury reached the cost justification issue is indicated by the interruption of its deliberations to have the cost proviso of the Act reread (PR. 40-41) notwithstanding the instructions to consider first whether petitioner was competitively injured by the admitted discrimination (PR. 9, 14-15, 16). In this setting the conclusion is warranted that the jury sustained the cost savings defense by accepting the partial savings shown in the study and assuming that the unevaluated "intangible" cost items sufficed to make up the difference.

supplied). In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1947), this Court held that in damage actions under the Robinson-Patman Act, the purchaser is entitled "to recover three times the *discriminatory difference* without proving more than the illegality of the prices" (emphasis supplied). By the very text of the statute the "discriminatory difference" is necessarily the entire amount of the price differential; for the statute refers to discrimination only in the prohibitory language preceding the cost proviso. See Austin, *op. cit. supra,* page 16, at 37. And the price differential is illegal by definition if it is "in excess of" the cost variance. (H. Rep. 2287, 74th Cong., 2d Sess., p. 10).

The *pro tanto* deduction theory is not only opposed by the controlling precedents and the legislative history, but it substantially weakens the effectiveness of the statute as a preventive force. If partial cost justification is legally cognizable, vendors will inevitably be tempted to favor large buyers with something extra in the secure knowledge that the monetary risks are small. The unjustified part of a discrimination may be altogether sufficient to favor the preferred customer in the competitive struggle for business, but, at the same time, insufficient to warrant the expense of litigation by the prejudiced purchaser.[13] "Private antitrust remedies may thus be simply unavailable to potential plaintiffs whose damages are relatively minor or whose financial standing is weak" (Comment, 61 YALE L. J. 1010, 1057 (1952)).

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[13] In the book jobbing business price differentials of less than 1 per cent suffice to switch business. See *Doubleday & Company, Inc.*, F.T.C. Docket No. 5897, decided 8/31/55, at Slipsheet page 25 (Initial Decision).

6. The rulings below sanction the precise kind of cost-savings claims which Congress took pains to reject

One of the unevaluated so-called "intangible" cost-savings claims, sanctioned below, was that the "predictability" of large purchases by the favored jobbers enabled respondent to avoid "overproduction" losses (PR. 21).

Whether this curious description of the effect of large predictable orders is accepted, or whether it is translated into the more candid proposition that such orders may reduce costs by permitting larger production runs, the legislative history is clear that such savings cannot be invoked to support price discrimination in favor of any particular customers. Congress anticipated and rejected this very tactic when it described the meaning of the cost proviso as follows (S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 5-6):

> "It is designed, among other things, to *preclude* the grant of a discrimination to a particular customer equal to the whole saving in cost *resulting to the seller's entire volume of business as augmented by that customer's patronage;* to preclude also differentials based on allocated or *imputed,* as distinguished from *actual,* differences in cost representing particular facilities or departments which the favored customer may not have immediately utilized, but with which the seller cannot dispense in the general conduct of his business.
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> " . . . *No particular customer should be permitted distinctively to claim the benefit, nor required distinctively to bear the burden, of the immediate use or nonuse of facilities which the seller must maintain for his business generally*" (emphasis supplied).[14]

[14] To the same effect, see H. Rep. No. 2287, 74th Cong., 2d Sess. p. 10.

The basic purpose of the Robinson-Patman Act is perverted by the contrary construction reflected in the "overproduction" savings theory authorized by the lower court.[15] This affords a prefabricated formula for justifying and perpetuating price discrimination in favor of large historic buyers, the very "evil" the Act was designed to stop. *Federal Trade Commission* v. *Morton Salt Company,* 334 U.S. 37, 43 (1948). For the amount of "overproduction losses" assertedly avoided by a seller due to the historic predictability of past purchases would vary precisely with the size of the customer.

7. The opinion below mistakenly sustains the injection of an immaterial motive factor into a statutory cause of action under the Robinson-Patman Act

In a lengthy instruction, predicated upon an old letter conflicting with a fraction of petitioner's extensive testimony, the trial court told the jury that his motive in suing was material to respondent's liability for price discrimination. The following extracts fairly describe the motive issue, as framed by the trial court's charge, in the face of the conceded discrimination against petitioner (PR. 27-28):

> "Now, you have to decide whether or not Reid lost his insurance money improvidently and . . . to find a way to make up for it . . . thought up this Robinson-Patman Act violation case as a means of collecting money from Harper & Brothers which he never believed and does not now believe that he is entitled to".

[15] The impropriety of this approach is accentuated here by the testimony of respondent's president that it sold direct to the 5000 largest retailers in the country (Tr. 925-6). Like petitioner, all of them were subject to Harper's higher price schedule for retailers.

The instruction emphasized that petitioner's motive bore on the validity of his claim, as distinct from his credibility.[16]

The opinion below sustained this instruction on two grounds: first, that the trial court was privileged to comment on the evidence, citing *Quercia* v. *United States,* 289 U.S. 466, 469-470 (1933); and second, that "the trial judge properly informed the jury that plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant *only* to the extent that it bore on his credibility as a witness" (App. 6a, emphasis supplied).

The injection of a motive criterion into a statutory action for price discrimination, is not sanctioned either by the *Quercia* case or by any other.[17] And the trial court did not inform the jury that petitioner's motive

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[16] The full charge is at pages 11-12 *supra.* It first advised that the letter in question

> "must be considered by you in connection with the weight that you attach to his testimony *and* to the claim which he makes in this case" (PR. 27).

It further said: "You see, it goes *into his basic claim;* it goes into his claim for damages, *and* it goes to his *credibility* as a witness" (*Ibid*).

It concluded: "you can see how it *destroys the very basis for his claim and* certainly would destroy much of his *testimony* with respect to his claim for damages" (PR. 28; emphasis supplied throughout).

[17] Compare, e.g., *Pellegrino* v. *Nesbit,* 203 F. 2d 463, 466 (9th Cir. 1953); *Magida* v. *Continental Can Co.,* 12 F.R.D. 74, 78 (S.D. N.Y. 1951); *United States* v. *Cotton Valley Operators Committee,* 75 F. Supp. 1, 6 (W.D. La. 1948); *Foremost Promotions Inc.* v. *Pabst Brewing Co.,* 15 F.R.D. 128, 130 (N.D. Ill. 1953).

did not bear on statutory rights, but only his credibility.[18]

The generic importance of this feature of the case is that it will gravely impede private enforcement of the antitrust laws. The Court of Appeals' endorsement of the motive aspect of the charge, even as mistakenly construed in its opinion, exposes all potential antitrust plaintiffs to the forbidding prospect of extensive interrogation concerning any of their private financial affairs, on the premise that reverses or lack of resources is relevant to the credibility of their testimony. The burdens of an antitrust plaintiff are heavy enough without this additional liability.

Moreover, the extremity of the charge warrants reaffirmation of Chief Justice Hughes' historic injunction in the *Quercia* case concerning the "inherent limitations" on the court's privilege to comment on the evidence. He there "emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided;' that 'deductions and theories not warranted by the evidence should be studiously avoided.'" (*Quercia* v. *United States*, 289 U.S. 466, 470 (1933). The incompatibility of the charge here with these limitations is manifest from the following concession of the trial

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[18] See note 17 *supra*. Aside from the instant instruction the only other mention of motive was a charge that respondent's "good faith or bad faith" was immaterial (PR. 25).

The fact is, moreover, that petitioner's testimony was not even essential to his claim for the "discriminatory difference" (*Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1933)). Discrimination was conceded and there was documentary evidence that he competed with respondent's favored customers. See pars. 5, 6, 7 pp. 2, 4, 8 *supra*.

court that he was consciously surpassing the bounds observed by respondent's own counsel in arguing the case to the jury (PR. 27):

> " . . . It is up to you to decide what that letter means because, although the attorney for Harper & Brothers was very polite *and did not quite say so,* the brutal fact remains that what he is charging Reid with is making a fantastic and baseless claim here in an effort to recover money that he lost as the result of misusing his insurance collection" (emphasis supplied).

The destructive effect of this charge on the jury is apparent from the request to have it reread during its deliberations (PR. 41-42).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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